

BEACH EROSION AND HURRICANE PROTECTION IN THE SECOND CIRCUIT: THE STATUTE OF LIMITATIONS AS A GOVERNMENT NEMESIS

Barbara Affeldt †

One of the world's most spectacular sand beaches runs from New England down the Atlantic coast, winding around Florida to reach along the northern edge of the Gulf of Mexico. Much of the 2,700-mile beach lies on the 295 "barrier islands" that stand between the sea and the mainland along the two coasts. Both the mainland beaches and the islands are under constant attack from the sea, which sometimes builds them up, sometimes tears them down[,] and continuously reshapes them.

The early inhabitants of the shore zone, recognizing that the coast has always been a hazardous place for people, settled on the bay side of the barrier islands, as far inland from the beach as possible. Construction was also kept well back of the mainland beaches. Over the past several decades that pattern has been reversed. Construction now takes place as close as possible to the shoreline. Today such resorts as Atlantic City, Ocean City, Virginia Beach, Hilton Head, Jekyll Island, Miami Beach[,] and Galveston Island occupy barrier islands, and summer homes crowd many of the beaches. Naturally pressure for public works to protect the islands and beaches is strong.¹

I. INTRODUCTION

A vigorous debate over the government's proper role in beach erosion and hurricane protection exists. There are those who believe that men and women can never win the battle against nature, and any attempts to inhibit the natural process of erosion of our nation's shorelines are economically illogical.² If shore restoration

† J.D., 1997, The City University of New York School of Law. M.S., 1989, Ithaca College; B.S., 1986, University of Massachusetts. The opinions expressed herein represent the personal views of the author and do not, in any way, reflect the views of the United States Department of Justice, the United States Department of the Army, or any other government agency.

¹ Robert Dolan & Harry Lins, *Beaches and Barrier Islands*, 257 SCIENTIFIC AMERICAN 68 (July 1987).

² See, e.g., BARRIER BEACH PRESERVATION ASSOCIATION, *THE WESTHAMPTON BEACH EROSION PROBLEM: NATURE VS.[.] SHORTSIGHTED MAN* (July 1984); Joe Demma, *Ban on Building at Shore Asked, Klein Seeks to Halt Construction That Causes Erosion Along the Ocean and L.I. Sound*, NEWSDAY (Long Island), Mar. 28, 1973, at 3; Mitchell R. Freedman & Donald Meyers, *Beach Erosion Danger, Klein Blasts 'Houses in Teeth of Atlantic'*, LONG ISLAND PRESS, Mar. 28, 1973, at 1; Robert Fresco, *Klein Expands Beach-Control*

projects are initiated, a related issue is whether the direct beneficiaries of these projects should contribute their fair and appropriate share of the overall costs. This issue may be the primary underlying factor that stimulates criticism of many projects.³ Indeed, because beachfront property is coveted and usually expensive to own, there is a perception that beach nourishment⁴ projects are government "gifts" to the wealthy.⁵ But there are those who assert that government intervention is critical in preserving United States shorelines for the beneficial use and enjoyment of all its citizens.⁶ As the debate over shore restoration projects continues, a principal public policy issue is the appropriate cost shares for federal and nonfederal (i.e., state and local) contributions to these projects.⁷

This article proposes one explanation for the decreased support for federal participation in shore restoration—the continually

Plan, NEWSDAY (Long Island), Mar. 29, 1973, at 7; Jane Snider, *Groins Unwanted, Klein Tells Army*, NEWSDAY (Long Island), Oct. 25, 1974, at 7; Hope Spencer & Jim Scovel, *Waves Leave Ruin, Controversy*, NEWSDAY (Long Island), Mar. 24, 1973, at 3.

³ COMMITTEE ON BEACH NOURISHMENT AND PROTECTION, NATIONAL RESEARCH COUNCIL, BEACH NOURISHMENT AND PROTECTION 43 (1995) [hereinafter BEACH NOURISHMENT AND PROTECTION].

⁴ Beachfill or nourishment is the process by which beach-compatible sand is dredged from the bed of a waterbody and pumped onto the beach to provide hurricane protection and beach erosion-control.

⁵ BEACH NOURISHMENT AND PROTECTION, *supra* note 3, at 43.

⁶ See generally American Shore and Beach Preservation Association, Position Paper, *On a Federal Policy for Shore Protection*, 64 SHORE & BEACH 3 (Oct. 1996).

Congress concluded that beach erosion and hurricane protection was important when it charged the United States Army Corps of Engineers (the "Corps") with primary responsibility in this area, Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §§ 401, 403, 404, 406-09, 411-16, 418, 502, 549, 686, 687 (1993), which necessarily included the allocation of government funds. R. Anne Sudar et. al., *Shore Protection Projects of the U.S. Army Corps of Engineers*, 63 SHORE & BEACH 3 (Apr. 1995). In the public's perception as well, beach preservation is of importance, and worth the allocation of resources. See BEACH NOURISHMENT AND PROTECTION, *supra* note 3, at 14. "Living at or near a coastline, particularly one with a sandy beach, is highly prized. [Indeed, there has been] a marked escalation in coastal population growth and in the value of land in many coastal areas." BEACH NOURISHMENT AND PROTECTION, *supra* note 3, at 14. A 1994 report by the U.S. Army Institute for Water Resources shows that federal spending on erosion control has been small, and has been cost-effective. SHORELINE PROTECTION AND BEACH EROSION CONTROL TASK FORCE, U.S. ARMY CORPS OF ENGINEERS, SHORELINE PROTECTION AND BEACH EROSION CONTROL STUDY: PHASE I: COST COMPARISON OF SHORELINE PROTECTION PROJECTS OF THE U.S. ARMY CORPS OF ENGINEERS, IWR Report 94-PS-1 (Jan. 1994) [hereinafter SHORELINE PROTECTION AND BEACH EROSION CONTROL TASK FORCE] (the results of this report were published in R. Anne Sudar et. al., *supra* at Ch. 3). In addition, "some beaches are recognized as having significant environmental value as habitats for a wide range of marine life, including threatened or endangered species." BEACH NOURISHMENT AND PROTECTION, *supra* note 3, at 14.

⁷ BEACH NOURISHMENT AND PROTECTION, *supra* note 3, at 43.

rising costs of litigation over government-sponsored projects. The focus of this article is an analysis of recent litigation concerning beach restoration in the Second Circuit, particularly on Long Island's south shore. The Second Circuit labeled construction and maintenance of one particular government project in this area a continuing tort, tolling the statute of limitations. This ruling exposes the government to litigation concerning this project indefinitely. As a result, the government will be forced to abandon future shore protection projects and spend those funds on perpetual litigation. The practical effect is that government intervention to protect this nation's shorelines will cease.

II. BACKGROUND

The mission of the United States Army Corps of Engineers (the "Corps") is to "provid[e] quality, responsive engineering services to the nation."⁸ To carry out this mission, the Corps presently employs nearly 37,000 Americans worldwide.⁹ The Corps' New York District is one of five districts within its North Atlantic Division.¹⁰ The New York District oversees projects in an eight state region (Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont) as well as Greenland.¹¹ The area within the boundaries of the New York District has the largest civilian population of any of the other districts,¹² and nearly twenty percent of all congressional members have constituents within this area.¹³

The Corps provides engineering and related services in four areas: water and natural resource management (civil works), military construction and support, engineering research and development, and support to other government agencies.¹⁴ One of the

⁸ N.Y. DISTRICT, U.S. ARMY CORPS OF ENGINEERS, COMMAND BRIEFING 1 (1995) [hereinafter *COMMAND BRIEFING*] (available from the U.S. Army Corps of Engineers, N.Y. District, Executive Office, Room 2100, 26 Federal Plaza, New York, N.Y. 10278).

⁹ U.S. ARMY CORPS OF ENGINEERS, SERVICE TO THE NATION: THE SPIRIT OF THE CORPS (n.d.).

¹⁰ Recently, Congress directed the Corps to reduce the number of its divisions to no more than eight and no fewer than six. Energy and Water Development Appropriations Act, 1997, Pub. L. No. 104-206, 1996 U.S.C.A.N. (110 Stat. 2984) 2989. See *Divisions Restructure*, ENGINEER UPDATE, Apr. 1997, at 1.

¹¹ N.Y. DISTRICT, U.S. ARMY CORPS OF ENGINEERS, A GUIDE TO SERVICES 13 (1989) [hereinafter *A GUIDE TO SERVICES*] (available from the U.S. Army Corps of Engineers, N.Y. District, Office of Public Affairs, Room 2108, 26 Federal Plaza, New York, N.Y. 10278).

¹² *Id.* at 1.

¹³ *COMMAND BRIEFING*, *supra* note 8, at 2-3.

¹⁴ U.S. ARMY CORPS OF ENGINEERS, NATION-BUILDERS 2 (n.d.) (available from the

Corps' primary civil works missions is the control of beach erosion and hurricane protection.¹⁵ Corps projects protect the nation's sea and lake shores from storm damage, but also reduce, or in some cases replace, losses from coastal erosion.¹⁶ In the civil works area, the New York District is responsible for activities in the watershed areas of the Hudson River Basin and Lake Champlain, the Atlantic coasts of New Jersey and New York, the Hackensack, Passaic, and Raritan River Basins in New Jersey, and New York Harbor.¹⁷

One project undertaken by the New York District, designed to control beach erosion and hurricane damage on the south shore of Long Island, is the *Fire Island Inlet to Montauk Point, Long Island, New York Beach Erosion and Hurricane Project*.¹⁸ Increasing erosion in this area has long been of particular concern due to occurrences of major hurricanes and severe storms.¹⁹ In 1955, Congress authorized the Secretary of the Army, in cooperation with the Secretary of Commerce and other federal agencies, to survey hurricanes and hurricane damage in the eastern and southern United States, and to examine methods for minimizing the damage caused by erosion and storms.²⁰ One of the purposes of the survey was to determine "possible means of preventing loss of human lives and damages to property, with due consideration of the economics of proposed breakwaters, seawalls, dikes, dams, and other structures, warning services, or other measures which might be required."²¹ The findings of this survey were eventually documented in a final report to

U.S. Army Corps of Engineers, N.Y. District, Office of Public Affairs, Room 2108, 26 Federal Plaza, New York, N.Y. 10278).

¹⁵ A GUIDE TO SERVICES, *supra* note 11, at 9.

¹⁶ A GUIDE TO SERVICES, *supra* note 11, at 9.

¹⁷ COMMAND BRIEFING, *supra* note 8, at 2.

¹⁸ N.Y. DISTRICT, U.S. ARMY CORPS OF ENGINEERS, GENERAL DESIGN MEMORANDUM No. 1, MORICHES TO SHINNECOCK REACH (1963 & Supp. 1969, 1980) [hereinafter GENERAL DESIGN MEMORANDUM No. 1] (documents may be obtained through the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (1966), by request in writing from the U.S. Army Corps of Engineers, N.Y. District, Office of Counsel, Room 1837, 26 Federal Plaza, New York, N.Y. 10278).

¹⁹ See, e.g., Laura Durkin, *Cohalan Sees Storm Threat to Shellfish*, NEWSDAY (Long Island), Apr. 24, 1984, at 19; Susan Gilbert, *America Washing Away*, SCIENCE DIGEST, Aug. 1986, at 28; Sarah Lyall, *Man vs. Nature in L.I. Beach Restoration*, N.Y. TIMES, May 10, 1991, at B1; John Rather, *Beach Homes Imperiled Anew*, N.Y. TIMES, Apr. 8, 1984, § 21, at 1; John Rather, *How Much More Erosion Can Beaches Take?*, N.Y. TIMES, Mar. 21, 1993, § 13, at 1; Steve Wick & Sidney C. Schaer, *A Way of Life Washed Away, Long Island Community Being Swallowed by Ocean*, NEWSDAY (New York), Mar. 21, 1993, at 50; Steve Wick & Sidney C. Schaer, *All Fall Down, The Disappearance of Dune Road*, NEWSDAY (Long Island), Mar. 21, 1993, at 4.

²⁰ Coastal and Tidal Areas—Survey—Damages, Pub. L. No. 84-71, 1955 U.S.C.C.A.N. (69 Stat. 132) 152.

²¹ *Id.*

Congress (the "Final Report").²² The section of the study concerning the Atlantic coast of Long Island from Fire Island Inlet to Montauk Point appeared as House Document No. 425.²³ The Final Report concluded that one of the primary ill-effects of hurricanes and storms was the erosion of beaches and dunes along the shoreline.²⁴

In the Final Report, the Corps proposed an ambitious project to reshape eighty-three miles of coastline, or approximately seventy percent of Long Island's total ocean frontage.²⁵ The plan provided for beach and dune fill, including periodic nourishment to maintain shore stability, "grass planting on the dunes, relocation or raising of existing buildings which are located in the dune area, [and] interior drainage structures . . ."²⁶ The Corps also recognized that construction of a series of protective jetties along the beach, technically known as "groins," could interrupt the flow of sand along

²² CHIEF OF ENGINEERS, DEPARTMENT OF THE ARMY, SOUTH SHORE OF LONG ISLAND FROM FIRE ISLAND INLET TO MONTAUK POINT, NEW YORK, BEACH EROSION CONTROL STUDY AND HURRICANE SURVEY, H.R. DOC. NO. 86-425 (1960).

²³ At that time, the U.S. Army Chief of Engineers reported to the Secretary of the Army that:

12. The shores of the area are exposed to waves of the Atlantic Ocean. For winds from the east and southeast the fetch is unlimited, but for those from the west and southwest the fetch is limited by the mainland of New Jersey. Thus, the resulting energy components produce a dominant westward littoral transport of beach material. Reversals in direction of transport of materials is greater in the eastern part of the area than in the western part, resulting in less net transport in the eastern part. Intermittent surveys of the shore and offshore depths since 1834 indicate alternate erosion and accretion with a net accumulating loss of beaches. Since 1940[,] the net loss westward of Mecox Bay is estimated at about 300,000 cubic yards annually, resulting in recession of the beaches in certain areas ranging from a maximum of 500 feet . . . to 70 feet The value of land lost by erosion is estimated at \$593,000 annually.

13. Hurricane losses in the area result chiefly from hurricane tides, action of storm waves, inundation caused by hurricane-induced rain, and wind action. Records indicate that since 1635 the area was affected by 126 storms, of which 9 were unusually severe; 17, severe; 41, moderate; and 59, threats only. A recurrence of the maximum hurricane tide of record, that of September 1938 when 45 lives were lost, under 1958 conditions would cause inundation and wave damages in the area estimated at \$52,600,000. The average annual ocean tidal damages in the area are estimated at \$3,667,000, including \$338,000 on the mainland along the inner bays.

Id. ¶¶ 12-13, at 4-5.

²⁴ *Id.* ¶ 148, at 76.

²⁵ *Id.* ¶ 3, at 1.

²⁶ *Id.* ¶ 123, at 61.

the shoreline and inhibit ongoing erosion.²⁷

Groins are solid structures, sometimes made out of stone, which are constructed perpendicular to the shoreline in groups to prevent storm damage, but especially to reduce and even replace sand loss from coastal erosion.²⁸ The function of groins is to trap sand deposited by the littoral drift²⁹ on their updrift side (i.e., on the side facing the current), and replace sand lost due to erosion.³⁰ However, groins may also cause downdrift beach starvation.³¹ Since groins extend out perpendicular from the shoreline up to 500 yards in some cases, the stretch of beach on the downdrift side (i.e., the side facing away from the flow of the littoral drift) becomes vulnerable to erosion by the current.³² Some studies indicate that erosion in these areas is actually increased—until a point further downdrift when the next groin begins to trap sand.³³ At least one of these studies indicates that, when erosion becomes severe enough, construction of a subsequent groin is necessary to protect the affected downdrift side.³⁴ This causes further erosion, requiring construction of yet another groin.³⁵ Conceivably, construction of an initial groin might lead to an entire coastline pro-

²⁷ *Id.* ¶ 14, at 5, ¶ 5, at 18, ¶ 12, at 21, ¶ 102(d), at 54, ¶¶ 113-14, at 58-59, ¶ 130, at 63, ¶ 148, at 76, ¶ 151, at 77.

²⁸ 1 COASTAL ENGINEERING RESEARCH CTR., DEP'T OF THE ARMY, SHORE PROTECTION MANUAL 5-35 (4th ed. 1984) [hereinafter SHORE PROTECTION MANUAL VOL. 1]; 2 COASTAL ENGINEERING RESEARCH CTR., DEP'T OF THE ARMY, SHORE PROTECTION MANUAL 6-76 (4th ed. 1984) [hereinafter SHORE PROTECTION MANUAL VOL. 2] (documents may be obtained by FOIA request in writing from the U.S. Army Corps of Engineers, N.Y. District, Office of Counsel, Room 1837, 26 Federal Plaza, New York, N.Y. 10278).

²⁹ "The beach and nearshore zone of a coast is the region where the forces of the sea react against the land. The physical system within this region is composed primarily of the motion of the sea, which supplies energy to the system, and the shore, which absorbs this energy." SHORE PROTECTION MANUAL VOL. 1, *supra* note 28, at 1-4. A "dynamic feature of the beach and nearshore physical system is *littoral transport*, defined as the movement of sediments in the nearshore zone by waves and currents. . . . The material that is transported is called *littoral drift*." SHORE PROTECTION MANUAL VOL. 1, *supra* note 28, at 1-13.

³⁰ Dolan & Lins, *supra* note 1, at 73, 76; Omar J. Lillevang, *Groins and Effects - Minimizing Liabilities*, in COASTAL ENGINEERING, SANTA BARBARA SPECIALTY CONFERENCE 749, 749 (AM. SOC'Y OF CIVIL ENG'RS, 1965). The *General Design Memorandum No. 1* for the project stated, "[t]he function of the groin is to provide, to build and to widen the protective beach by trapping littoral drift, or to retard the loss of sand fill with minimum interference with littoral movement." GENERAL DESIGN MEMORANDUM NO. 1, *supra* note 18, at 23.

³¹ See Douglas L. Inman & Birchard M. Brush, *The Coastal Challenge*, SCIENCE, July 6, 1973, at 20, 29; see also Lillevang, *supra* note 30, at 749.

³² SHORE PROTECTION MANUAL VOL. 1, *supra* note 28, at 5-35, 5-43.

³³ See, e.g., Inman & Brush, *supra* note 31, at 29; Lillevang, *supra* note 30, at 750.

³⁴ See Inman & Brush, *supra* note 31, at 29.

³⁵ See Inman & Brush, *supra* note 31, at 29.

tected by groins.³⁶ To combat this problem, sand fill is often pumped onto the shore, into the "compartments" between the groins.³⁷

The precise construction method to be employed, and the number of groins to be erected, is left within the discretion of the Corps, based upon experience and need.³⁸ The Corps recognizes, however, that if groins are to be employed, one of two alternative methods of construction may be necessary.³⁹ The littoral drift on the south shore of Long Island flows from east to west. If groins were constructed without beach fill between the groin compartments, construction should begin at the west end of a particular parcel and proceed in an easterly direction.⁴⁰ This method would not cause erosion west of the last groin if there were no beach at that point. If construction begins at the east end of a parcel, sand fill should be placed in the groin compartments as they are constructed.⁴¹ This would prevent erosion since the groin would trap very little sand as it flowed from east to west because the area between the groins would already be filled.

Congress approved the beach erosion and hurricane protection project recommended for Long Island's south shore in the Rivers and Harbors Act of 1960.⁴² The Rivers and Harbors Act of 1960⁴³ and the Final Report⁴⁴ required New York State and Suffolk County to agree to certain conditions of local cooperation as a prerequisite for federal participation in the project. Specifically, New

³⁶ One study suggests:

The real "need" for a second or third structure may have been only temporary However, if additional structures are built, the down-coast erosion becomes more severe with each succeeding structure, until finally a "point of no return" is reached where the need for additional protection from erosion becomes so urgent that the only choices are: (i) to continue to build protective works, (ii) to find a new source of beach sand, or (iii) possibly a combination of both.

Inman & Brush, *supra* note 31, at 29.

³⁷ SHORE PROTECTION MANUAL VOL. 1, *supra* note 28, at 5-43.

³⁸ H.R. DOC. NO. 86-425, ¶ 130, at 63, ¶ 151, at 77 (1960). No precise recommendations were set forth in the Final Report relating to construction of, or number of, groins, although the report recognized that "[s]ome limited groin construction might be found warranted initially in the most vulnerable locations." *Id.* ¶ 114, at 59.

³⁹ *Id.* ¶ 122, at 61.

⁴⁰ *Id.*; SHORE PROTECTION MANUAL VOL. 1, *supra* note 28, at 106-08.

⁴¹ H.R. DOC. NO. 86-425, ¶ 122, at 61; SHORE PROTECTION MANUAL VOL. 1, *supra* note 28, at 106-08.

⁴² Land Acquisition Policy Act of 1960, Pub. L. No. 86-645, § 101, 74 Stat. 480, 546-50 (1960).

⁴³ *Id.* at 551.

⁴⁴ H.R. DOC. NO. 86-425, ¶ 18, at 7.

York State was to submit specific assurances of local cooperation, and was obligated to provide funding.⁴⁵ Suffolk County was to contribute a portion of the funding required for the project, obtain easements from landowners, and maintain the project after completion (i.e., pump sand fill into the groin compartments).⁴⁶

The project authorized up to fifty groins, apportioned between three sections ("reaches"); thirteen groins were to be located in the reach between Fire Island Inlet and Moriches Inlet, twenty-three on the Westhampton Barrier Beach, and fourteen in the Southampton to Beachampton Reach.⁴⁷ In 1963, New York State and the Corps executed an Assurance of Local Cooperation (the "Assurance") for the Westhampton Barrier Beach portion of the project.⁴⁸ This Assurance provided for the construction of thirteen groins starting at the east end of the barrier beach with extensive sand fill in the compartments.⁴⁹ New York State agreed to maintain all the works, to undertake periodic beach nourishment, and to adopt laws to preserve and restore beaches and dunes.⁵⁰ However, Suffolk County's Board of Supervisors refused to participate in the project as defined by the Assurance, objecting to the placement of sand fill in the compartments.⁵¹ Suffolk County approved a limited project which included construction of eleven groins, beginning at the east end of the barrier beach, without the placement

⁴⁵ § 101, 74 Stat. at 551, 553-54.

⁴⁶ *Id.* at 553-54.

⁴⁷ GENERAL DESIGN MEMORANDUM NO. 1, *supra* note 18, app. A.

⁴⁸ The specific terms of participation were set forth in an Assurance of Local Cooperation, signed by the State Superintendent of Public Works on August 14, 1963. U.S. Army Corps of Engineers, Assurance of Local Cooperation (1963) (amended 1964, 1968) [hereinafter Assurance of Local Cooperation] (document may be obtained by FOIA request in writing from the U.S. Army Corps of Engineers, N.Y. District, Office of Counsel, Room 1837, 26 Federal Plaza, New York, N.Y. 10278).

⁴⁹ Letter from Col. M.M. Miletich, District Engineer, U.S. Army Corps of Engineers, to J. Burch McMorrin, Superintendent, New York State Department of Public Works, advising of the inclusion of thirteen groins in the initial project construction (Aug. 1, 1963) (document may be obtained by FOIA request in writing from the U.S. Army Corps of Engineers, N.Y. District, Office of Counsel, Room 1837, 26 Federal Plaza, New York, N.Y. 10278).

⁵⁰ Assurance of Local Cooperation, *supra* note 48, at 2-3.

⁵¹ See *Beach Erosion Vote Delayed by Suffolk in Fiscal Dispute*, N.Y. TIMES, Aug. 6, 1963, at 33; Ronald Maiorana, *Suffolk Hedges on Erosion Work: Board Approves Army Plan for Beach Control, but Imposes Conditions*, N.Y. TIMES, Aug. 13, 1963, at 33. Suffolk County's concerns were summarized in *Rapf v. Suffolk*, 755 F.2d 282 (2d Cir. 1985). "[S]ince [Suffolk] County was to be responsible for maintenance of the groins, it would have the [financial] burden of maintaining any sand fill which was added; and [Suffolk] County showed preference for the wealthier and more politically influential homeowners in the East end." *Id.* at 286 n.5.

of sand fill.⁵²

Work on the project began in 1965 with construction of two groins at Georgica Pond in East Hampton.⁵³ No fill was added to this groin compartment. Between January 1965 and October 1966, eleven groins were installed on the Westhampton Barrier Beach, beginning on the east end. Historically, this section is most vulnerable to storms.⁵⁴ Clearly, at the time of design, the Corps contemplated that these groin compartments would be filled.⁵⁵ However, the compartments between these groins were not filled at the insistence of local interests.⁵⁶ Since natural filling did not occur, storms damaged the area immediately west of the eleven groins.⁵⁷ Due to this subsequent depletion of sand from the western beach, the Corps wrote to New York State urging that "dune and beach fill [was] critically required" between the groins.⁵⁸ New York State re-

⁵² Suffolk County, N.Y., Resolution No. 74-64, Relating to Erosion on the Atlantic Shore Front in Suffolk County and the Construction of Groins (Feb. 3, 1964).

⁵³ GENERAL DESIGN MEMORANDUM NO. 1, *supra* note 18, app. A.

⁵⁴ *Id.* at app. D9

⁵⁵ The *General Design Memorandum No. 1* for this project states:

Because the shore is being reinforced with sand fill immediately after the construction of groins, the groins will serve to retard the loss of sand. Because the shore in which the groins will be placed is subject to severe erosion and storm breakthrough[] of the narrow barrier beach, the groins will serve to protect the width of the reinforced beach by retarding loss of sand, and interrupt the lateral currents that are caused by the breaks through the off-shore-bar and that cause heavy cut back of the shore.

Id.

⁵⁶ See *supra* notes 51-52 and accompanying text.

⁵⁷ See Letter from Col. R.T. Batson, District Engineer, U.S. Army Corps of Engineers, to Division Engineer, North Atlantic Division, reporting the results of an inspection of the groin field to determine whether the dune and beach fill phase of the work should be initiated in accordance with the agreement between New York State and the federal government that artificial fill would be added when and to the extent found necessary by the Chief of Engineers (May 8, 1967) (document may be obtained by FOIA request in writing from the U.S. Army Corps of Engineers, N.Y. District, Office of Counsel, Room 1837, 26 Federal Plaza, New York, N.Y. 10278); Letter from Col. R.T. Batson, District Engineer, U.S. Army Corps of Engineers, to Division Engineer, North Atlantic Division, reporting the results of a field reconnaissance made of Fire Island and the area east of Moriches Inlet to determine existing beach conditions (Feb. 20, 1967) (document may be obtained by FOIA request in writing from the U.S. Army Corps of Engineers, N.Y. District, Office of Counsel, Room 1837, 26 Federal Plaza, New York, N.Y. 10278).

⁵⁸ Letter from Brig. Gen. H.G. Woodbury, Jr., Director of Civil Works, United States Department of the Army, to J. Burch McMorran, Superintendent, New York State Department of Public Works, reporting that groins alone would not provide the beach erosion control and hurricane protection authorized, and that dune and beach fill was critically required (June 1, 1967) (document may be obtained by FOIA request in writing from the U.S. Army Corps of Engineers, N.Y. District, Office of Counsel, Room 1837, 26 Federal Plaza, New York, N.Y. 10278).

plied requesting the placement of beach fill in the existing groin field, and the construction of four additional groins with dune and beach fill on Westhampton Beach.⁵⁹ Once again, Suffolk County objected to the placement of fill. Between August 1969 and November 1970, however, four additional groins were built to the west, and the four westernmost compartments were filled, to alleviate damage.⁶⁰ Due to funding limitations, Suffolk County could not support the subsequent artificial filling of the compartments between the first eleven groins.⁶¹ Additionally, Suffolk County would not support a proposal by the Corps to undertake further groin construction.⁶² To date, no further construction of groins on the beach has taken place.⁶³

III. THE PROBLEM

As a result of these and similar projects, landowners have brought suit for erosion allegedly caused by inadequate construction and/or maintenance of projects.⁶⁴ Since the New York Dis-

⁵⁹ Letter from J. Burch McMorrin, Superintendent, New York State Department of Public Works, to Brig. Gen. H.G. Woodbury, Jr., Director of Civil Works, United States Department of the Army, requesting construction of four additional groins and the placement of dune and beach fill in all groin compartments (June 16, 1967) (document may be obtained by FOIA request in writing from the U.S. Army Corps of Engineers, N.Y. District, Office of Counsel, Room 1837, 26 Federal Plaza, New York, N.Y. 10278).

⁶⁰ The westernmost portion of the 15 groins is located 3.2 miles east of Moriches Inlet. See GENERAL DESIGN MEMORANDUM No. 1, *supra* note 18, app. A, D.

⁶¹ See David A. Andelman, *U.S. Plan on Beaches Disputed*, N.Y. TIMES (BQLI), Apr. 1, 1973, at 87; Demma, *supra* note 2, at 3; Freedman & Meyers, *supra* note 2, at 1; Fresco, *supra* note 2, at 7; Ed Lowe, *Gilgo Beach Washed Out by Storm*, NEWSDAY (Long Island), Mar. 27, 1973, at 5; Donna Petrozzello, *Dispute Snags Funds to Plug Inlet*, HAMPTON CHRON., Mar. 11, 1993, at 1; John Rather, *Plan Gains to Monitor and Predict Changes in Beach Erosion*, N.Y. TIMES (L.I.), July 5, 1992, at 7; Snider, *supra* note 2, at 7; Spencer & Scovel, *supra* note 2, at 3; Bob Wacker, et. al., *A Barrier Beach Is Breached . . . and Now Its Doom Is Predicted*, NEWSDAY (Long Island), Apr. 4, 1973, at 3.

⁶² See newspaper articles cited *supra* note 61.

⁶³ However, the New York District has begun pumping beach fill into the compartments between the first eleven groins as part of a settlement agreement stemming from recent litigation concerning the construction. See *Erosion Suit Settled*, THE EAST-HAMPTON STAR, Mar. 27, 1986, at 1.

⁶⁴ See, e.g., *Applegate v. United States*, 28 Fed. Cl. 554 (1993), *rev'd*, 25 F.3d 1579 (Fed. Cir. 1994) (suit by 217 owners of beachfront property near Port Canaveral and Sebastian Inlet in Brevard County, Florida, seeking recovery of compensation for erosion and flood damage to their properties allegedly caused by the Corps in constructing and maintaining the Canaveral Harbor Project, designed to provide a deepwater harbor on the east coast of Florida); *Pitman v. United States*, 457 F.2d 975 (Ct. Cl. 1972) (suit to recover just compensation for an alleged taking of beachfront property in Brevard County, Florida. Plaintiff alleged he had sustained harm to his property as a result of construction and operation of the Canaveral Harbor Project. The essence of plaintiff's claim was that the project had interrupted southerly littoral drift and

trict first commenced work on Long Island's south shore, several suits have been filed in the Second Circuit against the United States pursuant¹ to the Federal Tort Claims Act (the "FTCA"), and requesting a total of nearly \$300 million in damages.⁶⁵ Generally, these plaintiffs sued the federal government alleging that their properties, located to the west of the groins, suffered catastrophic damage.⁶⁶ They further alleged that this damage occurred as a result of improper design, construction, and maintenance of the groins presently in place and the failure to complete the beach erosion and hurricane protection project in this area.⁶⁷ These plaintiffs asserted that erosion along Long Island's south shore was minimal prior to the beginning of groin construction.⁶⁸ However, the area to the west of the groins eroded much faster after construction was completed.⁶⁹ In addition, most of the sand was

thereby caused the loss of about four acres of his property.); *Miramar Co. v. Santa Barbara*, 143 P.2d 1 (Cal. 1943) (owner of a large resort hotel sued seeking compensation because the hotel's beach property had been reduced in size by erosion allegedly caused by the Santa Barbara Breakwater); *Katenkamp v. Union Realty Co.*, 59 P.2d 473 (Cal. 1936) (owners of oceanfront land east of the defendant's two groins brought a series of suits seeking an injunction to remove them for allegedly causing erosion of the plaintiffs' property).

⁶⁵ In 1973, Thomas O'Grady and Dorothy Patton brought suit against the United States and Suffolk County in the United States District Court for the Eastern District of New York. Complaint, *O'Grady v. United States*, No. 73 Civ. 1182 (E.D.N.Y. filed Nov. 2, 1973). *O'Grady* was brought on behalf of all property owners living immediately west (i.e., on the downdrift side) of the 15th groin, and alleged that the partially completed groin field caused rapid erosion of the plaintiffs' property. *Id.*

O'Grady was superseded in 1984 when a complaint was filed by individual homeowners on the west end of the Westhampton Barrier Beach. Complaint, *Rapf v. Suffolk*, No. CV-84-1478 (E.D.N.Y. filed Apr. 11, 1984). The plaintiffs sought injunctive relief against Suffolk County, alleging that the County "constructed or caused to be constructed" groins along the barrier beach, and that the County's failure to maintain the groins constituted a continuing nuisance that threatened to destroy their homes and those of their neighbors. *Id.*

While the *Rapf* suit was pending, Michael Kennedy, a prominent Manhattan attorney, brought an action against the United States alleging that construction and supervision of the groins at Georgica Pond was performed negligently, blocking the normal replenishment of sand on his property and causing a constant and swift loss of beachfront. Complaint, *Kennedy v. United States*, No. CV-85-0581 (E.D.N.Y. filed Feb. 25, 1985).

⁶⁶ See, e.g., Complaint at 3, *Kennedy v. United States*, 643 F. Supp. 1072 (E.D.N.Y. 1986) (No. CV-85-0581); Complaint at 7, *Rapf v. Suffolk*, 755 F.2d 282 (2d Cir. 1985) (CV-84-1478). An¹ alarming photograph of a 1992 breach of the barrier island at Westhampton Beach, just west of the 15th groin, which led to catastrophic damage, is reprinted on the cover of U.S. Army Corps of Engineers, *NEW YORK DISTRICT TIMES*, May, 1996, at 1.

⁶⁷ See, e.g., Complaint at 3, *Kennedy* (No. CV-85-0581); Complaint at 7, *Rapf* (CV-84-1478).

⁶⁸ See, e.g., Complaint at 7, *Rapf* (CV-84-1478).

⁶⁹ *Id.*

trapped by the groins in the first few years after their construction was completed, causing a majority of the erosion to plaintiffs' properties, over the last four decades.⁷⁰

One of the government's preliminary procedural defenses was an assertion that these suits were time barred by the FTCA's two-year statute of limitations.⁷¹ However, the Second Circuit consistently rejected the government's argument, holding that the plaintiffs stated a claim "for a continuing tort for which the cause of action accrues anew each day."⁷² Thus, it is possible that numerous other plaintiffs could bring suit against the United States, since the practical effect of this ruling creates a new cause of action every day. It is conceivable that the government will continue to assert the statute of limitations defense in its answers, and argue that the Second Circuit erred in its decision. To date, the United States Supreme Court has not ruled on the issue of whether construction of shore restoration projects may constitute continuing torts under the FTCA, thereby exposing the government to liability years after projects are completed.⁷³

IV. THE FEDERAL TORT CLAIMS ACT AND ITS STATUTE OF LIMITATIONS

The FTCA and its provisions⁷⁴ represent a limited waiver of the United States' sovereign immunity from liability arising out of the tortious conduct of its employees.⁷⁵ As such, the FTCA is a

⁷⁰ *Id.*

⁷¹ See, e.g., *Rapf v. Suffolk*, 755 F.2d 282, 288 (2d Cir. 1985); *Kennedy v. United States*, 643 F. Supp. 1072, 1079 (E.D.N.Y. 1986).

⁷² *Rapf*, 755 F.2d at 292.

⁷³ The Supreme Court did, however, address this issue with regard to a claim for a taking under the Tucker Act, 28 U.S.C. §§ 507, 1346(a), 1402(a), 1491, 1496, 1497, 1501, 1503, 2071, 2072, 2411, 2501, 2512 (1993). See *United States v. Dickinson*, 331 U.S. 745 (1947).

⁷⁴ The provisions of the FTCA, originally enacted as the Legislative Reorganization Act of 1946, are now scattered throughout various sections of the United States Code. Legislative Reorganization Act of 1946, Pub. L. No. 79-601, 60 Stat. 812 (codified as amended at 28 U.S.C. §§ 1291, 1346(b), (c), 1402(b), 1504, 2110, 2401(b), 2402, 2411(b), 2412(c), 2671-2680 (1993)).

⁷⁵ LESTER S. JAYSON, *HANDLING FEDERAL TORT CLAIMS: ADMINISTRATIVE AND JUDICIAL REMEDIES* § 1.03, at 1-13 (1997).

An immunity is a freedom from suit or liability. . . . The traditional governmental immunity protects governments at all levels from legal actions. At the level of the state and national governments, this immunity is usually referred to as sovereign immunity. . . . Though the notion of sovereign immunity might seem best suited to a government of royal power, the doctrine was nevertheless accepted by American judges in the early days of the republic, and the law of the United States has

critical remedial provision because it allows citizens to bring suit against the federal government for its tortious conduct. Indeed, it constitutes the most comprehensive remedy in terms of coverage.⁷⁶ The explicit language of the FTCA assures that it was designed to address any tort actionable under state law in the jurisdiction where the conduct occurs.⁷⁷ Most scenarios, such as an automobile accident, leave no doubt that a tort has been committed.⁷⁸ There is no conceptual difficulty as to when this tort was committed and by whom, and whether there was resultant damage. However, some scenarios comprise more complex, attenuated, and unperceived conduct. Such cases may include medical malpractice, toxic tort, and environmental tort claims. Particularly in these situations, the accrual dates are difficult to determine. The operation of the statute's two-year limitations period is therefore problematic. Such is the case when the tort appears to be ongoing, for which the plaintiff defers bringing suit. The availability of an FTCA remedy, then, often turns on the operation of the statute's limitations period.

In the original Legislative Reorganization Act of 1946, the statute of limitations period was established at one year.⁷⁹ In 1949, this Act was amended, increasing the limitations period to two years.⁸⁰ The provisions were modified again in 1966, requiring the filing of

ever since been that, except to the extent the government consents to suit, it is immune. . . . [The FTCA] gave a general consent of the government to be sued in tort

W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 131, at 1032-34 (5th ed. 1984).

⁷⁶ JAYSON, *supra* note 75.

⁷⁷ 28 U.S.C. § 1346(b) provides that "district courts . . . shall have exclusive jurisdiction of civil actions [in all cases] under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

⁷⁸ See S. REP. NO. 89-1327, at 2519 (1966).

⁷⁹ § 420, 60 Stat. 812, at 845.

⁸⁰ Federal Tort Claims Act—Time for Bringing Suit, Pub. L. No. 81-55, 1949 U.S.C.C.S. (62 Stat. 971) 62, 66 (codified as amended at 28 U.S.C. § 2401(b) (1994)).

The committee feel[s] that, in comparison to analogous [s]tate and [f]ederal statutes of limitation, the existing [one]-year period is too short and tends toward injustice in many instances. For example, an analysis of the statutes of limitation of the 48 [s]tates and the District of Columbia reveals that the average limitation provided for personal injury cases is 2.96 years, for property damage cases it is 3.90 years, and for cases of death by wrongful act it is 1.90 years. The over[]all combined average is the one to which the Tort Claims Act limitation should be compared, since the Tort Claims Act covers all three types of torts under one inclusive period of limitation.

H.R. REP. NO. 81-276, at 1227 (1949).

an administrative claim, and the claim's denial by a federal agency, as a prerequisite to bring suit.⁸¹ The modifications regarding claims accruing on or after January 18, 1967 appear in the FTCA's current statute of limitations, codified at 28 U.S.C. § 2401(b).⁸²

The language of the FTCA limitations period has generated many questions. Particularly critical for our purpose is this question: At what point does an FTCA cause of action accrue and the statutory period begin to run? The answer is inherently difficult to determine.

It is clear from the language of the statute that state law determines whether the defendant's action gives rise to a cause of action at all. Actions may be maintained against the government "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the [state] where the . . . [negligence] occurred."⁸³ Stated another way, state law controls the question of *whether* a cause of action accrues. However, issues arose early in the judicial interpretation of § 2401(b) over whether state or federal law controls the determination of *when* a claim accrues under the FTCA. The legislative history of § 2401(b) does not aid in resolving this point. No language in the reports specifically refers to what is meant by the term "accrues."⁸⁴ Statements in the reports address the length of the period in which to bring a claim once that claim is actionable.⁸⁵

Before 1980, some courts held that state law controlled when a claim accrued.⁸⁶ However, subsequent courts have concluded that

⁸¹ Tort Claims—Agency Consideration, Pub. L. No. 89-506, § 7, 1966 U.S.C.C.A.N. (80 Stat. 306) 346, 348.

⁸² 28 U.S.C. § 2401(b) provides:

A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate [f]ederal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. § 2401(b) (1994).

Also important is a provision in 28 U.S.C. § 2675 which states: "The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section." 28 U.S.C. § 2675 (1994).

⁸³ 28 U.S.C. § 1346(b) (1994).

⁸⁴ See, e.g., H.R. REP. NO. 81-276 (1949). The 1966 Amendment made the time of filing the administrative claim the critical date for limitations purposes, but although the reports indicate this change in detail, they do not further explain when a claim "accrues" within the meaning of 28 U.S.C. § 2401(b). S. REP. NO. 89-1327 (1966).

⁸⁵ See, e.g., S. REP. NO. 89-1327, at 2518; H.R. REP. NO. 81-276, at 1227.

⁸⁶ For example, until the 1980s, the First Circuit held that state law governed when a claim accrues for purposes of the FTCA. See, e.g., *Hau v. United States*, 575 F.2d

federal law controls this determination.⁸⁷ There was great debate on this question in the early 1960s.⁸⁸ Now federal law is uniformly held to control when a claim accrues under the two-year statute applying to tort claims against the United States.⁸⁹ Courts have held that the FTCA prescribes its own limitations. Where the time allowed for an action against a private party under local law is less than that prescribed in the FTCA, the more generous time prescribed in the FTCA is allowed for suit against the United States.⁹⁰ At the same time, where local law allows a more generous time than that set forth in the FTCA, the time prescribed in the FTCA controls.⁹¹ The rationale for these rules is stated in *Quinton v.*

1000, 1002 (1st Cir. 1978); *see also* *Caron v. United States*, 548 F.2d 366, 367-68 (1st Cir. 1976); *Tessier v. United States*, 269 F.2d 305, 309 (1st Cir. 1959). Although the First Circuit has not expressly reversed itself on this issue, in more recent cases it has referred exclusively to federal law for the definition of accrual. *See Nicolazzo v. United States*, 786 F.2d 454, 455 (1st Cir. 1986). Lower courts within the First Circuit have interpreted *Nicolazzo* as holding that federal law controls. *See Attallah v. United States*, 758 F. Supp. 81, 83 (D.P.R. 1991); *Santana v. United States*, 693 F. Supp. 1309, 1312 n.2 (D.P.R. 1988).

⁸⁷ *See, e.g.*, *Slaaten v. United States*, 990 F.2d 1038, 1041 (8th Cir. 1993); *Gould v. United States Dep't of Health & Human Servs.*, 905 F.2d 738, 742 (4th Cir. 1990), *cert. denied*, 498 U.S. 1025 (1991); *Stoleson v. United States*, 629 F.2d 1265, 1268 (7th Cir. 1980); *Ware v. United States*, 626 F.2d 1278, 1283-84 (5th Cir. 1980); *Tyminski v. United States*, 481 F.2d 257, 262-63 (3d Cir. 1973).

⁸⁸ *See* Recent Developments, *Federal Law Held to Govern Accrual of Cause of Action Under Federal Tort Claims Act*, 63 COLUM. L. REV. 536 (1963).

[B]ecause suits under the [FTCA] possess elements of diversity actions although they are brought under a federal statute that contains a limitation on the time of suit, the problem is presented of determining which law governs the commencement of the litigation. This question has previously been decided by two district courts and two courts of appeals. Both district courts held that federal law governs as to the time at which the statute of limitations begins to run. The courts of appeals have divided, the First Circuit holding that state law governs, and the Fifth Circuit holding to the contrary.

Id. at 538-39 (citations omitted).

⁸⁹ *See* *United States v. Kubrick*, 444 U.S. 111 (1979). The Supreme Court did not expressly address the issue, but the accrual rule that emerged was in large part based on the Court's opinion in *Urie v. Thompson*, 337 U.S. 163, 168-71 (1949), where the Court held that federal law controls. *Kubrick*, 444 U.S. at 120 n.7. The Court analyzed congressional intent, and did not refer to or address state law in any way. *Id.* at 119-21. As such, the Court implied that federal law controls.

⁹⁰ *See, e.g.*, *Young v. United States*, 184 F.2d 587, 589 (D.C. Cir. 1950) (FTCA's two-year period, rather than the District of Columbia's one-year period, applied to a claim for "death occasioned by negligence"); *Maryland ex rel. Burkhardt v. United States*, 165 F.2d 869, 875 (4th Cir. 1947) (FTCA's two-year period applied rather than Maryland's one-year period for wrongful death claims).

⁹¹ *See, e.g.*, *Magruder v. Smithsonian Inst.*, 758 F.2d 591, 593-94 (11th Cir. 1985) (FTCA's two-year period, rather than Florida's four-year period, applied to a claim for alleged conversion by the Smithsonian Institute); *Wollman v. Gross*, 637 F.2d 544,

United States:⁹²

Obviously, if the various states' rules could severally determine when a claim accrued against the [g]overnment under [s]ection 2401(b), the uniformity which Congress sought by enacting that section would be, for all practical purposes, a goal impossible of attainment. Differing state rules as to when a particular tort claim accrues would necessarily produce diverse decisions as to the effect of [s]ection 2401(b).⁹³

As such, federal courts have been free to develop their own law with respect to *when* a claim accrues under § 2401(b).

V. THE FTCA'S STATUTE OF LIMITATIONS IN SECOND CIRCUIT NEGLIGENCE CLAIMS FOR EROSION

In its most recent decision concerning a negligence claim under the FTCA for coastal erosion, the Second Circuit held, in *Rapf v. Suffolk*,⁹⁴ that the statute of limitations was tolled because the government's actions amounted to a continuing tort. This decision and the United States District Court's decision from the Eastern District of New York in *Kennedy v. United States*⁹⁵ were not favorable to the government. In *Rapf*, individual homeowners of oceanfront property west of the fifteenth groin brought an action seeking injunctive relief against Suffolk County. They alleged that the County "constructed or caused to be constructed" the groins on the Westhampton Barrier Beach, and failed to maintain them, constituting a continuous nuisance that threatened to destroy their homes.⁹⁶ The Second Circuit explicitly rejected Suffolk County's position that the suit was time barred by the statute of limitations. The court held that the plaintiffs stated a claim for a continuing tort (i.e., where there is a series of continuing harms to the plaintiff) "for which the cause of action accrues anew each day."⁹⁷ However, the *Rapf* court decided an issue solely on New York law because, at the time, Suffolk County was the only defendant. *Rapf* held, in essence, that inaction may constitute a continuing tort.⁹⁸

549-50 (8th Cir. 1980) (FTCA's limitations period rather than South Dakota's three-year period applied to a negligence claim).

⁹² 304 F.2d 234 (5th Cir. 1962).

⁹³ *Id.* at 236.

⁹⁴ 755 F.2d 282 (2d Cir. 1985).

⁹⁵ 643 F. Supp. 1072 (E.D.N.Y. 1986).

⁹⁶ *Rapf*, 755 F.2d at 284.

⁹⁷ *Id.* at 290.

⁹⁸ The *Rapf* holding is explicitly based on three New York cases. See *Kearney v. Atlantic Cement Co.*, 306 N.Y.S.2d 45 (App. Div. 1969); *Amax, Inc. v. Sohio Indus. Prods. Co.*, 469 N.Y.S.2d 282 (Sup. Ct. 1983); *State v. Schenectady Chems., Inc.*, 459

In *Kennedy*, where the United States was the defendant, property owners alleged that government construction and supervision of the two stone groins at Georgica Pond were performed negligently and in reckless disregard of the duty of care owed to property owners.⁹⁹ Furthermore, they alleged that the action constituted a continuing nuisance and a continuing trespass.¹⁰⁰ Citing *Rapf*, the court held that the Kennedy's made out a claim for a continuing tort "for which the cause of action accrues anew each day."¹⁰¹ Therefore, the statute of limitations for tort claims against the United States did not bar the action.¹⁰²

N.Y.S.2d 971 (Sup. Ct. 1983, *modified*, 479 N.Y.S.2d 1010 (App. Div. 1984)). Each of these cases involved the allegedly tortious contamination of land from a single act, followed by the failure to remove the contamination. *Kearney*, 306 N.Y.S.2d at 46; *Amax*, 469 N.Y.S.2d at 283-84; *Schenectady*, 459 N.Y.S.2d at 974. At the time the suits were filed, the contamination had continued for many years. *Kearney*, 306 N.Y.S.2d at 46 (six years); *Amax*, 469 N.Y.S.2d at 284 (approximately twenty years); *Schenectady*, 459 N.Y.S.2d at 974 (approximately thirty years). Under New York law, as derived from these cases, the failure to repair the original condition may constitute a continuing tort even when the last active transgression occurred many years before. *Kearney*, 306 N.Y.S.2d at 46-47; *Amax*, 469 N.Y.S.2d at 284-85; *Schenectady*, 459 N.Y.S.2d at 977-78.

⁹⁹ *Kennedy v. United States*, 643 F. Supp. 1072, 1075 (E.D.N.Y. 1986). For a profile of the plaintiffs in this case, see Michael Cross, *Ivana's Avenger*, N.Y. MAG., Feb. 18, 1991, at 33.

¹⁰⁰ *Kennedy*, 643 F. Supp. at 1075.

¹⁰¹ *Id.* at 1079 (citing *Rapf v. Suffolk*, 755 F.2d 282, 292 (2d Cir. 1985)).

¹⁰² Judge Wexler ultimately ruled in favor of the United States in *Kennedy*, finding that no causation was established between construction of the groins and the eroded property. In deciding the statute of limitations issue, Judge Wexler concluded that the construction constituted a continuing tort. *Id.* (citing *Rapf*, 755 F.2d at 292). However, in his decision following trial on the merits, Judge Wexler stated that the United States' "alleged negligence ceased" in 1972. Findings of Fact and Conclusions of Law at 5, *Kennedy* (No. CV-85-0581). These statements are inconsistent. If the government's acts or omissions constituted a continuing tort for which a cause of action accrues anew each day, how can it be that the United States' negligence suddenly ceased in 1972, some seven years after the groins were constructed in 1964-1965?

In his decision on the merits, Judge Wexler found several facts:

The solution to this [downdrift] beach starvation is to introduce new sand into the [groin] system or otherwise build up the starved areas downdrift of the groin fields. In theory, once the groin compartments are filled, the sand can resume its unrestricted movement downdrift but, until the groins have been filled either through artificially filling them or naturally being filled by the downward drift, there is beach erosion downdrift of the last groin. . . .

The groins were substantially filled by trapping sand since 1972 and the downdrift has been mitigated extensively.

The Corps failed to introduce new sand into the groin system after 1972.

Id. ¶ 4, at 3-4, ¶ 9, at 4, ¶ 10, at 4.

Judge Wexler concluded:

Here, plaintiffs failed to meet their burden of proof that the de-

defendant's alleged negligence was the proximate cause of their injuries. Plaintiffs have not established that the erosion damage resulting from the downward drift of defendant's groins severely weakened the shoreline, nor have they established that any damage resulting from defendant's negligence prior to 1972, when starvation of the downward drift ceased, has continued to the present.

Since plaintiffs purchased [the property] in 1976, four years after *defendant's alleged negligence ceased*, plaintiffs cannot now establish that the Corps of Engineers' construction of or failure to maintain the two groins substantially caused the injuries complained of.

Id. ¶ 5, at 5, ¶ 6, at 5-6 (emphasis added).

Unfortunately, in this decision there is no application which might shed light on the reasoning behind Judge Wexler's conclusions. This leaves a burning question: Why did the United States' alleged negligence cease in 1972? The answer to this question might have serious implications for the resolution of issues in future cases since this conclusion leads to an ultimate finding of no causation. If adopted in future decisions, Judge Wexler's reasoning might prove favorable to the government.

It is clear that Judge Wexler ultimately found no causation between construction and maintenance of the groins and erosion of the plaintiffs' property because the United States' alleged negligence ceased in 1972, and the plaintiffs did not purchase the property until 1976. However, regardless of when the plaintiffs purchased the property, the fact still remains that the alleged negligence ceased.

There were several references to causation in briefs submitted by both sides. *See* Defendants' Post-Trial Reply Memorandum of Law, *Kennedy v. United States*, No. CV-85-0581 (E.D.N.Y. June 30, 1988) [hereinafter Defendants' Post-Trial Reply]; Plaintiffs' Reply Memorandum of Law, *Kennedy v. United States*, No. CV-85-0581 (E.D.N.Y. June 29, 1988) [hereinafter Plaintiffs' Reply]; Defendants' Post-Trial Memorandum of Law, *Kennedy v. United States*, No. CV-85-0581 (E.D.N.Y. June 6, 1988) [hereinafter Defendants' Post-Trial Memorandum]; Plaintiffs' Post-Trial Memorandum of Law, *Kennedy v. United States*, No. CV-85-0581 (E.D.N.Y. June 6, 1988) [hereinafter Plaintiffs' Post-Trial Memorandum]. Four main points continually recurred:

(1) In theory, once groin compartments become filled, either artificially or naturally, the sand can resume its unrestricted movement downdrift. The time period required for the entire system to naturally fill and the material to resume its unrestricted movement downdrift may be so long that severe downdrift damage may result. Nevertheless, the Georgica Pond groin compartments completely filled in 1972. The United States alleged that the normal downdrift patterns were re-established, and the groins became a neutral factor in any later erosion at the plaintiffs' home. *See* Defendants' Post-Trial Reply, at 5-6, 10; Plaintiffs' Reply, at 12; Plaintiffs' Post-Trial Memorandum, at 7-10.

(2) *See* Inman & Brush, *supra* note 31; SHORE PROTECTION MANUAL VOL. 1, *supra* note 28; SHORE PROTECTION MANUAL VOL. 2, *supra* note 28. Expert opinion indicates that even after the groins are filled, an area immediately downdrift of the groins may continue to be adversely affected. Transport patterns of sand are never fully re-established. There is a "shadow effect" downdrift of the groins; sediment that rounds the tip of a groin and finds itself in deeper water is not going to be transported suddenly shoreward. The transported offshore sand does not suddenly make a right angle turn and return to shore. Thus, sediment leaves the beach at its normal rate due to wave and tidal action, but the groins interfere with the deposit of sediment from upshore that would otherwise compensate for that loss. Although the transport patterns may re-establish themselves further down the beach, the area within the shadow of the groins (1000-1500 feet according to the government expert and up to 3000 meters according to the plaintiffs' expert) continues to be starved for sand even after the groins are filled. The Kennedy property is located some 3300 feet from the nearest

The *Kennedy* court's reliance on *Rapf* was erroneous. The Second Circuit held, in *Rapf*, that under New York law a continuous tort may be the result of continuous inaction. However, when determining when a cause of action accrues under the FTCA, federal law applies. Under federal law, an alleged tortfeasor's inaction is insufficient to support a finding of continuous tort¹⁰³ except in

federal groin. *See* Defendants' Post-Trial Reply, at 8-9; Plaintiffs' Reply, at 12, 15; Defendants' Post-Trial Memorandum, at 18.

(3) Erosion to the plaintiffs' property may have been caused by other factors. These include the opening of the Georgica Pond "gut" just east of the plaintiffs' home, *see* Defendants' Post-Trial Reply, at 9, and natural forces such as the rising sea level, storms, and tides. *See* Defendants' Post-Trial Reply, at 21, 23, 26-27; Plaintiffs' Reply, at 12-13.

(4) The trimline (i.e., the line of vegetation and grasses landward of dunes which: (1) measures the stable protective border between the beach and the land; and (2) anchors the sand, acting as a buffer against natural forces) in front of the plaintiffs' property had not been affected since 1972. According to expert testimony, movement of the trimline is a more reliable measure of erosion since a grass and vegetation line is a stronger protective barrier than sand against the effects of wind and water. *See* Defendants' Post-Trial Reply, at 5, 22-23.

Applying these principles to the Westhampton groin field:

(1) The Corps did not add any artificial fill to the compartments of the first eleven groins in the field when they were constructed. These compartments are naturally filling. The Corps did add artificial fill to the compartments of the last four groins in the field during their construction, and they are also naturally filling. The definition of "full" is difficult to articulate. It is not clear that any of the compartments have reached their full capacity. In addition, the Corps recently began to add fill to the compartments of the initial groins as part of an interim project. Therefore, it is not likely that the normal downward littoral drift pattern (from east to west) has been re-established.

(2) It is likely that the Westhampton groins have a "shadow effect" similar to the Georgica Pond groins. This is a function of, among other things, the length of the groins. The two groins at Georgica Pond are 475 feet long. The "shadow effect" is 1000-1500 feet according to the government expert or up to 3000 meters according to the plaintiffs' expert. Similarly, the Westhampton groins are approximately 500 feet long. The length of their "shadow effect" might be significant depending on the distance between the groins and the easternmost plaintiffs in future cases.

(3) Natural forces such as rising sea levels, storms, and tides may have caused erosion to the plaintiffs' property. Severe storms in the spring of 1984 and in December 1986, and a "syzygy" storm (i.e., when the full moon and high tides coincide with a severe northeastern storm) in January 1987, had a dramatic impact along much of Long Island's south shore. Additionally, December 1992 storms seriously damaged Dune Road, Westhampton Beach, New York, and the property of many of its residents. The damage was so bad that Judge Bartels issued a decision stating that a settlement conference should be held. Memorandum-Decision at 1-2, *Rapf v. Suffolk*, No. CV-84-1478 (E.D.N.Y. 1993).

¹⁰³ For purposes of the limitations period, courts generally distinguish between continuing acts and singular acts that bring continuing consequences. A continuing ill effect arising from earlier misconduct does not constitute a continuing tort in and of itself. *See, e.g.,* *Batiste v. Boston*, 23 F.3d 394, 1994 WL 164568, at *2 (1st Cir. May 2, 1994) (unpublished); *Aiello v. Browning Ferris, Inc.*, 1993 WL 463701, at *7 (N.D. Cal. Nov. 2, 1993); *Chudzik v. Wilmington*, 809 F. Supp. 1142 (D. Del. 1992).

those distinguishable cases alleging continuous trespass resulting from a mistaken deed.¹⁰⁴ Continuing violations under federal law require ongoing tortious conduct, or a chain of tortious activity.¹⁰⁵ This is significant since the Second Circuit held, in *Kossick v. United States*,¹⁰⁶ that a rationale which might allow an action to toll the statute of limitations under New York State law was not effective to toll the statute under the FTCA.¹⁰⁷

The federal government's position is made more tenuous by the Federal Circuit's decision in *Applegate v. United States*¹⁰⁸ because that court's decision is consistent with the Second Circuit's decision in *Rapf*. *Applegate* is likely to be relied on by future plaintiffs, even in the Second Circuit. In *Applegate*, 271 Florida beachfront landowners claimed a taking of their properties by erosion caused by the Corps' Canaveral Harbor Project.¹⁰⁹ The United States Court of Federal Claims granted the government's motion to dismiss for the plaintiffs' failure to file suit within the six-year statute of limitations under the Tucker Act.¹¹⁰ "Plaintiffs could foresee, beginning in 1966, if not earlier, that the [Canaveral Harbor] Project would cause serious damage to their properties,"¹¹¹ but plaintiffs did not file suit until December, 1992.¹¹² The Federal Circuit reversed, relying on *United States v. Dickinson*.¹¹³ The *Dickinson*

¹⁰⁴ See, e.g., *Nieman v. NLO, Inc.*, 108 F.3d 1546, 1559 (6th Cir. 1997).

¹⁰⁵ See, e.g., *Page v. United States*, 729 F.2d 818, 821 (D.C. Cir. 1984); *Leonhard v. United States*, 633 F.2d 599, 613 (2d Cir. 1980), cert. denied, 451 U.S. 908 (1981); *Donaldson v. O'Conner*, 493 F.2d 507, 529 (5th Cir. 1974), vacated on other grounds, 422 U.S. 563 (1975). Even the existence of an ongoing relationship does not insure that a cause of action will be deemed continuous for purposes of computing the statute of limitations period. See, e.g., *Cooper v. United States*, 442 F.2d 908 (7th Cir. 1971) (holding that inaction was not a continuing violation under the FTCA where the government repeatedly refused to provide medical treatment to a plaintiff for injuries received in jail).

¹⁰⁶ 330 F.2d 933 (2d Cir. 1964), cert. denied, 379 U.S. 837 (1964).

¹⁰⁷ *Id.* at 934-36.

¹⁰⁸ 25 F.3d 1579 (Fed. Cir. 1994).

¹⁰⁹ The *Applegate* plaintiffs claimed a Fifth Amendment taking, rather than negligence under the FTCA. However, the court utilized applicable reasoning in concluding that the erosion amounted to a continuous taking. Indeed, a suit based on identical facts as *Rapf* was filed in the Court of Federal Claims alleging a Fifth Amendment taking. Complaint, *DeVito v. United States*, No. 96-78L (Fed. Cl. Feb. 9, 1996). Subsequently, the parties in that case stipulated to its dismissal. Stipulation and Notice of Dismissal Without Prejudice, *DeVito v. United States*, No. 96-69L (Fed. Cl. Oct. 3, 1996).

¹¹⁰ *Applegate v. United States*, 28 Fed. Cl. 554, 563-65 (1993), rev'd, 25 F.3d 1579 (Fed. Cir. 1994).

¹¹¹ *Id.* at 563.

¹¹² *Id.* at 557.

¹¹³ 331 U.S. 745 (1947).

Court held that where the government "[leaves] the taking to physical events,"¹¹⁴ the claimant can postpone filing suit until the situation becomes "stabilized."¹¹⁵ The Federal Circuit Court found that the Corps set in motion a very gradual and perpetual physical taking, and further complicated ascertaining the extent and nature of the damage by proposing to install a sand transfer plant.¹¹⁶ Thus, the taking situation had not been stabilized.¹¹⁷ The court in *Applegate* concluded that these landowners, who suffered an ongoing, gradual, and physical taking, need not have risked premature litigation. "Under the *Dickinson* rule, the statute of limitations did not bar [the] suit in 1992."¹¹⁸

The Second Circuit should adopt the Court of Federal Claims' reasoning in *Applegate*. This, of course, would be favorable to the federal defendants, and in accord with the tenet that the FTCA's statute of limitations "should be liberally construed in favor of repose for the United States."¹¹⁹ Certainty, definiteness, or foreseeability of flooding or erosion, and not the complete erosion of the "last grain of sand," should define the taking and trigger the limitations period.¹²⁰

Rapf, *Kennedy*, and *Applegate* would be distinguishable from future litigation concerning the Westhampton groin field. For example, in *Applegate*, the Federal Circuit heavily relied on the Corps' promises to repair the damage as evidence that the situation in that case had not stabilized.¹²¹ Here, the Corps has made no promises to repair the damage by modifying permits, or removing the groin field. The court in *Rapf* interpreted New York law where all parties were New York litigants.¹²² In determining when a cause of action arises under the FTCA, federal law applies.¹²³ Thus, federal law would apply in any future suit concerning the Westhampton groin field brought against the United States as defendant. *Kennedy* was decided in favor of the government at the district court level, and

¹¹⁴ *Id.* at 748.

¹¹⁵ *Id.* at 749.

¹¹⁶ *Applegate v. United States*, 25 F.3d 1579, 1582 (Fed. Cir. 1994).

¹¹⁷ *Id.* at 1583-84.

¹¹⁸ *Id.* at 1584.

¹¹⁹ *Cooper v. United States*, 442 F.2d 908, 912 (7th Cir. 1971).

¹²⁰ *Applegate v. United States*, 28 Fed. Cl. 554, 562 (1993), *rev'd*, 25 F.3d 1579 (Fed. Cir. 1994).

¹²¹ *Applegate*, 25 F.3d at 1582-84.

¹²² *Rapf v. Suffolk*, 755 F.2d 282, 284 (2d Cir. 1985). Subsequently, the United States was impleaded as a third party defendant. However, the statute of limitations issue was never revisited as it might have applied to this defendant.

¹²³ See *supra* notes 86-89 and accompanying text.

overlooked the proper interpretation of a "continuing violation" under federal law.¹²⁴

VI. THE RELATED ISSUE OF DAMAGES

If the Second Circuit remains steadfast in its decision to label the project a continuing tort, then the quantum of damages would become a critical issue. The general rule in cases of continuing torts is that the plaintiff is permitted to recover damages only for harm up to the time of trial.¹²⁵ To recover for harm caused by future invasions (i.e., after the time of trial), the injured person must bring successive actions for the invasions or series of invasions.¹²⁶ Only when the invasion is "substantial and relatively enduring in character and not readily alterable," can the injured party request an injunction or elect to sue for future damages "once and for all."¹²⁷ Thus, damages may be categorized as those for past harms and those for future harms, with the time of trial being the divider. Here, because a jurisdictional prerequisite exists to sue under the FTCA, the filing of an administrative claim may be considered the critical date for limitations purposes.¹²⁸

Federal law on damages for past invasions is much less clear. The *Restatement (Second) of Torts* section 899 comment d suggests the general rule is:

the statute [of limitations] *does not run from the time of the first harm except [as to] the harm then caused.* Thus, for example, when there has been the tortious emission of fumes from a factory, the plaintiff is not required to treat the harm as a unit and is entitled to recover . . . damages *for harm that has accrued within the period provided by statute* for that type of tort.¹²⁹

This implies that when the first wave hit Long Island's south shore after groin completion in 1960, the statute of limitations began to run *as to the harm caused by that wave*, and continued for two years. At the end of that two year period, the opportunity to sue for harm *caused by that wave* was lost. When the next wave hit the

¹²⁴ See, e.g., cases cited *supra* note 105.

¹²⁵ JAYSON, *supra* note 75, § 14.03[4] (citing RESTATEMENT (SECOND) OF TORTS § 899 cmt. d (1977)).

¹²⁶ RESTATEMENT (SECOND) OF TORTS § 930 cmt. a (1977). Federal law supports the proposition that plaintiffs must sue in successive actions. See *Reynolds Metals Co. v. I.B. Wand*, 308 F.2d 504, 508 (9th Cir. 1962).

¹²⁷ RESTATEMENT (SECOND) OF TORTS § 930 cmt. b (1977). See *id* § 161 cmt. b (1963-1964).

¹²⁸ See Tort Claims—Agency Consideration, Pub. L. No. 89-506, § 7, 1966 U.S.C.C. A.N. (80 Stat. 306) 346, 348.

¹²⁹ RESTATEMENT (SECOND) OF TORTS § 899 cmt. d (1977) (emphasis added).

shore, the statute began to run *as to the harm caused by that particular wave*, and continued for two years. At the end of that two year period, the opportunity to sue for harm *caused by that particular wave* was lost, and so on.

The above analysis, coupled with the rule that an injured party must generally sue for future damages in successive actions, implies that damages are limited to those sustained during the period of limitations immediately prior to the filing of an administrative suit. Although there is no federal case law that specifically interprets the statement that "the statute does not run from the time of the first harm except [as to] the harm then caused,"¹³⁰ federal cases imply that damages are limited.¹³¹ Additionally, several recent federal cases rely on state law for the proposition that damages are limited.¹³²

New York law is clear that damages are limited. The statute of limitations in New York "for injury to property" is three years.¹³³ In *Amax, Inc. v. Sohio*,¹³⁴ a suit to recover damages for radioactive contamination, the Supreme Court, New York County held that the storage and disposal of waste was a continuing nuisance.¹³⁵ The court noted, with respect to future damages, that the plaintiff could sue in successive actions or once and for all. However, "damages [were] limited to such as were sustained within three years prior to the commencement of suit."¹³⁶ In *Kearney v. Atlantic Cement Co.*,¹³⁷ another continuing nuisance case, the Appellate Divi-

¹³⁰ *Id.*

¹³¹ For example, in *Urie v. Thompson*, 337 U.S. 163 (1949), the Supreme Court rejected the notion that the injured plaintiff had a continuing cause of action with "each intake of dusty breath." *Id.* at 170. "[A]pplication of such a rule would, arguably, limit petitioner's damages to that aggravation of his progressive injury traceable to the last eighteen months of his employment." *Id.*

¹³² See, e.g., *Nieman v. NLO, Inc.*, No. 95-3677, 1997 WL 119768, at *14 (6th Cir. March 19, 1997) (holding, under Ohio law, that plaintiff could recover damages for continuing trespass, but could "only claim damages incurred within the four years prior to filing the lawsuit"); *Huffman v. United States*, 82 F.3d 703, 705 (6th Cir. 1996) (holding, under Kentucky law, that although a temporary nuisance claim was not barred by the statute of limitations, "recovery would be limited to damages caused within the limitations period immediately preceding the initiation of the action." (citation omitted)); *In re Tutu Wells Contamination Litigation*, 909 F. Supp. 980, 989 (D.C. Virgin Islands 1995) ("the plaintiff will ordinarily be limited to only those past . . . injuries which have occurred within the applicable statute of limitations period immediately before the plaintiff filed his suit").

¹³³ N.Y. C.P.L.R. 214 (McKinney 1990).

¹³⁴ 469 N.Y.S.2d 282 (Sup. Ct. 1983).

¹³⁵ *Id.* at 284-85.

¹³⁶ *Id.* at 284 (citing 36 N.Y. JUR., LIMITATIONS AND LACHES § 88).

¹³⁷ 306 N.Y.S.2d 45 (App. Div. 1969).

sion, Third Department stated, "damages are recoverable only to the extent that they were sustained during the three years immediately prior to the commencement of the respective actions, plaintiffs are not precluded by the statute of limitations from seeking a permanent injunction or damages in the instant actions."¹³⁸

Amax and *Kearney* were relied on by the *Rapf* court,¹³⁹ although this reliance was concededly to determine when the plaintiffs' cause of action accrued.¹⁴⁰ The *Rapf* court did not reach the issue of a limitation of damages. However, equity demands that the Second Circuit should follow the lead of other circuits and rely on state law to limit damages. The United States District Court for the Eastern District of New York relied on *Rapf* on the issue of when a cause of action accrues,¹⁴¹ although federal law applied. Even so, it would seem appropriate for the Eastern District in future actions to limit damages.

A successful argument on this point could have a tremendous impact on the outcome of future cases for the government. For example, a hypothetical storm causes catastrophic damage on Long Island's south shore in January, 1994. If plaintiffs filed administrative claims¹⁴² for erosion to their properties on January 1, 1996 and tolled the statute of limitations, it would seem that their opportunity to sue for damages for harms that occurred before January 1, 1994 would expire. The plaintiffs would be limited to damages sustained within the two years immediately prior to the filing of administrative claims (i.e., between January 1, 1994 and January 1, 1996). This is significant. If the claims filed were proce-

¹³⁸ *Id.* at 47 (citations omitted).

¹³⁹ *Rapf v. Suffolk*, 755 F.2d 282, 291 (2d Cir. 1985).

¹⁴⁰ See *supra* note 98 and accompanying text.

¹⁴¹ *Kennedy v. United States*, 643 F. Supp. 1072, 1079 (E.D.N.Y. 1986).

¹⁴² The FTCA constitutes a waiver of sovereign immunity, so its terms must be strictly construed. The FTCA provides that "[a]n action shall not be instituted upon a claim against the United States . . . unless the claimant shall have first presented the claim to the appropriate [f]ederal agency . . ." 28 U.S.C. § 2675(a) (1994). The filing of an administrative claim is a mandatory condition precedent to the filing of a civil action against the United States for damages arising from the negligent act or omission of any government employee acting within the scope of his employment. *Melo v. United States*, 505 F.2d 1026, 1028 (8th Cir. 1974); *Osijo v. United States*, 850 F. Supp. 992, 992 (E.D.N.Y. 1993); *Kohlbeck v. Kis*, 651 F. Supp. 1233, 1236 (D. Mont. 1987). Often plaintiffs file a Standard Form-95 Claim for Damage, Injury, or Death. The "SF-95" claim form is generally used in such instances, although any claim that states a sum certain and gives the government agency enough information to investigate the claim is sufficient. *GAF Corp. v. United States*, 818 F.2d 901, 917 (D.C. Cir. 1987); *Avery v. United States*, 680 F.2d 608, 610-11 (9th Cir. 1982); *Byrne v. United States*, 804 F. Supp. 577, 581 (S.D.N.Y. 1992).

durally defective in some way,¹⁴³ and the defects were not corrected until January 1, 1997, this could limit the damages recoverable to only those sustained during the two years immediately preceding this remedial action (i.e., between January 1, 1995 and January 1, 1997), thereby eliminating damages exacerbated by the January, 1994 storm.¹⁴⁴

The federal courts in the Second Circuit should adopt the State of New York's interpretation on limiting damages because: (1) the timing of the plaintiffs' filing of administrative claims might suggest plaintiffs believe they can only sue for damages sustained within the limitations period; (2) this interpretation of the law on recovery for past harms is consistent with federal law on recovery for future harms; (3) the FTCA sets a two-year limit in all cases,¹⁴⁵ and does not make an exception for continuing torts.

VII. A PROPOSAL

One commonly litigated accrual question, arising primarily in medical malpractice cases, is whether a claim accrues when the negligent or wrongful acts occur or when the claimant discovers the material facts underlying the claim. In *Kubrick v. United*

¹⁴³ The language of the FTCA spells out four specific requirements concerning the submission of administrative claims. See 28 U.S.C. §§ 2401(b), 2672, 2675 (1994). These are: (1) the claim must be presented in writing; (2) to the agency out of whose activities the claim arose; (3) in a sum certain; and (4) within two years of its accrual. JAYSON, *supra* note 75, § 17.09[1]. So, for example, a claim would be incomplete if it did not specify damages. *F.G.S. Constructors, Inc. v. Carlow*, 823 F. Supp. 1508, 1512 (D.S.D. 1993).

Additionally, a claim must bear an authorized signature. A claim for injury to or loss of property may be presented by the owner of the property, his duly authorized agent, or legal representative. 28 C.F.R. § 14.3(a) (1995). If the claim is signed by the agent or legal representative, it must show the title or legal capacity of the person signing, and be accompanied by evidence of his/her authority to present a claim on behalf of the claimant as agent or other representative. Standard Form-95 Claim for Damage, Injury, or Death, 1995 (available from the U.S. Army Corps of Engineers, N.Y. District, Office of Counsel, Room 1837, 26 Federal Plaza, New York, N.Y. 10278). The claims processing regulation requiring evidence of a legal representative's authorization to present a claim is a jurisdictional prerequisite to institute a court action under the FTCA. *Martinez v. United States*, 743 F. Supp. 298, 302 (D.N.J. 1990); *Pringle v. United States*, 419 F. Supp. 289, 292 (D.S.C. 1976).

¹⁴⁴ Even if the procedural defects in the administrative claims were overlooked, money damages sought are bound by sum certain limits. Absent new evidence, the amount of suit may not exceed the total money damages initially sought in a claim. 28 U.S.C. § 2675(b) (1994). See *Colin v. United States*, 324 F. Supp. 121 (D. Mo. 1970). Hence, money damages are capped at the total stated in a claim or claims (if there are multiple plaintiffs in a suit).

¹⁴⁵ 28 U.S.C. § 2401(b).

States,¹⁴⁶ a forty-eight year old veteran was treated with the antibiotic neomycin for a leg infection in 1968.¹⁴⁷ Approximately six weeks later, he noticed a ringing in his ears and hearing loss.¹⁴⁸ In 1969, a doctor secured his Veteran's Administration ("VA") hospital records and informed him that it was "highly possible" that his hearing loss was the result of the neomycin treatment.¹⁴⁹ The doctor did *not* say that the treatment was improper.¹⁵⁰ In 1971, a second doctor advised Kubrick that the neomycin should not have been administered.¹⁵¹ Kubrick filed suit in 1972, alleging that the VA hospital negligently treated his ailment.¹⁵² The Third Circuit held that Kubrick's claim did not accrue until 1971.¹⁵³ Even though Kubrick was aware of his injury and the government's responsibility for it in 1969, his claim did not accrue until he had reason to know that the VA hospital had breached its duty to him.¹⁵⁴ In other words, it was not until 1971 that Kubrick discovered that the acts causing the injury may have constituted medical malpractice.¹⁵⁵ In so holding, the Third Circuit found plaintiff's claim to accrue upon his discovery that he was injured, his discovery of the cause of the injury, *and* his discovery that the injury was caused by negligence.¹⁵⁶

The Supreme Court reversed. The Court held that Kubrick's claim accrued in 1969, and was thus barred by the two-year statute of limitations for a tort claim.¹⁵⁷ The Court refused to extend the

¹⁴⁶ 435 F. Supp. 166 (E.D. Pa. 1977), *aff'd*, 581 F.2d 1092 (3d Cir. 1978), *rev'd*, 444 U.S. 111 (1979).

¹⁴⁷ *Id.* at 168.

¹⁴⁸ *Id.* at 169-70.

¹⁴⁹ *Id.* at 172.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 173.

¹⁵² *Id.* at 174.

¹⁵³ *Kubrick v. United States*, 581 F.2d 1092, 1097-98 (3d Cir. 1978), *rev'd*, 444 U.S. 111 (1979).

¹⁵⁴ *Id.* at 1097.

¹⁵⁵ The court followed the reasoning in *Exnicious v. United States*, 563 F.2d 418 (10th Cir. 1977). The Tenth Circuit stated:

Limitations should not bar a claimant before he has a reasonable basis for believing he has a claim. Therefore[,] until a claimant has had a reasonable opportunity to discover *all* of the essential elements of a possible cause of action for malpractice—damages, duty, breach[,] and causation—his claim against the [g]overnment does not accrue. And where a claimant is given a "credible explanation" of his condition not pointing to malpractice, he may not be found to have failed to exercise reasonable diligence because he did not earlier pursue his claim.

Id. at 420-21 (citations omitted).

¹⁵⁶ *Kubrick*, 581 F.2d at 1097.

¹⁵⁷ *Kubrick v. United States*, 444 U.S. 111, 122-23 (1979).

"blameless ignorance"¹⁵⁸ doctrine to a point where it would protect the plaintiff until he was aware not only of the injury and its cause, but also that his legal rights were invaded.¹⁵⁹ In other words, the Court did not require *Kubrick* to demonstrate his knowledge that the action constituted government negligence. Under *Kubrick*, a claim for medical malpractice accrues within the meaning of the FTCA, at the latest, on the date when the plaintiff knows of, or in the exercise of reasonable diligence should have known of, just the existence and the cause of his injury.¹⁶⁰ *Kubrick* effectively narrowed the broader holdings of cases similar to that of the Third Circuit. To the extent that these cases fix accrual at a point later than the discovery of injury and cause,¹⁶¹ they are no longer good law.

Many circuits interpret *Kubrick* as applying an objective standard.¹⁶² A determination of when the statute begins to run turns

¹⁵⁸ The "blameless ignorance" rule was announced in *Urie v. Thompson*, 337 U.S. 163 (1949). It provides that a cause of action does not accrue until the plaintiff's injury manifests itself. *Id.* at 170-71. In *Urie*, the plaintiff contracted silicosis while working as a fireman, *id.* at 165-66, but his condition was not diagnosed until after he became too ill to work. *Id.* at 170. Reluctant to charge *Urie* with the "unknown and inherently unknowable," *id.* at 169, the Court held that because of his "blameless ignorance" of the fact of his injury, his cause of action did not accrue until the disease became apparent. *Id.* at 170-71.

¹⁵⁹ *Kubrick*, 444 U.S. at 122-23. The Court stated:

We are unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment. That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury. He is no longer at the mercy of the latter. There are others who can tell him if he has been wronged, and he need only ask. If he does ask and if the defendant has failed to live up to minimum standards of medical proficiency, the odds are that a competent doctor will so inform the plaintiff.

Id. at 122.

¹⁶⁰ *Id.* at 120.

¹⁶¹ See *Stoleson v. United States*, 629 F.2d 1265, 1268-69 (7th Cir. 1980). The court stated:

Several courts of appeals, including this one, have recently expanded the discovery rule to prevent accrual of a claim until a patient has had a reasonable opportunity to discover each of the elements of a cause of action—duty, breach, causation, and damages. This expansion was cut short and back by the Supreme Court in *Kubrick*. A claim accrues when a patient acquires possession of the critical facts of injury and cause.

Id. at 1268 n.3 (citations omitted); *Dessi v. United States*, 489 F. Supp. 722, 724 (E.D. Va. 1980) (discussing *Kubrick*, the court stated: "This decision signifies a retreat from the expansive view of 'accrual' previously adopted by a number of the circuits . . .").

¹⁶² See, e.g., *Herrera-Diaz v. United States Dep't of Navy*, 845 F.2d 1534, 1537 (9th

not on when the plaintiff actually knew of the injury and its cause, but rather on when "a reasonable person would know enough to prompt a deeper inquiry into a potential cause . . ." ¹⁶³ The implementation of an objective standard would be critical if the Second Circuit were to adopt the *Kubrick* discovery rule in FTCA claims for erosion.

Indeed, many courts have applied the *Kubrick* discovery rule to FTCA claims other than malpractice claims.¹⁶⁴ Some courts have even held that *Kubrick* is not limited to FTCA or medical malpractice cases.¹⁶⁵ Only a few courts have declined to apply *Kubrick* outside of the medical malpractice context.¹⁶⁶ The Second Circuit could apply a modified discovery rule fashioned from *Kubrick* in FTCA negligence claims for erosion.¹⁶⁷ Under the FTCA, "[p]laintiff may not, in effect, hide its head in the sand, ignoring the accrual of a cause of action until the two-year limitation[s] period has expired and then attempt to circumvent the limitation by alleging a combination of tortious acts or a continuing tort."¹⁶⁸

The press often writes about the Westhampton groin field

Cir. 1988), *cert. denied*, 488 U.S. 924 (1988); *Barren v. United States*, 839 F.2d 987, 990 (3d Cir.), *cert. denied*, 488 U.S. 827 (1988); *Nemmers v. United States*, 795 F.2d 628, 631 (7th Cir. 1986), *on remand*, 681 F. Supp. 567 (C.D. Ill. 1988), *aff'd*, 870 F.2d 426 (7th Cir. 1989); *Arvayo v. United States*, 766 F.2d 1416, 1421-22 (10th Cir. 1985).

Relying on *Kubrick*, we have developed an objective standard to determine when a medical malpractice action accrues under the FTCA. The action accrues, and the statute of limitation starts to run, when a "plaintiff has discovered, or in the exercise of reasonable diligence should have discovered, both his injury and its cause."

Herrera-Diaz, 845 F.2d at 1537 (quoting *Davis v. United States*, 642 F.2d 328, 331 (9th Cir. 1981), *cert. denied*, 455 U.S. 919 (1982)).

¹⁶³ *Nemmers*, 795 F.2d at 632. "Our question, then, is whether the running of the statute of limitations depends on the plaintiffs' personal knowledge and reactions or whether it depends on the reactions of the objective, 'reasonable' man. The answer is the latter, an answer reflected in the formula 'knew or should have known.'" *Id.* at 631.

¹⁶⁴ See, e.g., *Ware v. United States*, 626 F.2d 1278 (5th Cir. 1980); *Korgel v. United States*, 619 F.2d 16 (8th Cir. 1980); *Alaska Pacific, Inc. v. United States*, 650 F. Supp. 29 (D. Nev. 1986), *cert. denied*, 493 U.S. 846 (1989).

¹⁶⁵ See, e.g., *Dubose v. Kansas City S. Ry. Co.*, 729 F.2d 1026, 1031 (5th Cir. 1984) (applying the *Kubrick* discovery rule to a case under the Federal Employers' Liability Act, 45 U.S.C.A. § 56).

¹⁶⁶ See, e.g., *Steele v. United States*, 599 F.2d 823 (7th Cir. 1979).

¹⁶⁷ Kent Sinclair and Charles A. Szypszak have proposed that a simple discovery and reasonable diligence standard, such as that employed in medical malpractice cases under the FTCA, should govern in all troublesome situations, including continuous course of conduct cases. Kent Sinclair & Charles A. Szypszak, *Limitations of Action Under the FTCA: A Synthesis and Proposal*, 28 HARV. J. ON LEGIS. 1, 39 (1991).

¹⁶⁸ *Lynch v. United States Army*, 474 F. Supp. 545, 549 (D.C. Md. 1978) (citing *United Missouri Bank South v. United States*, 423 F. Supp. 571, 577 (W.D. Mo. 1976)).

problems.¹⁶⁹ Presumably a reasonably diligent Long Island resident would occasionally read the newspaper.¹⁷⁰ A potential plaintiff would know of the existence of his/her injury (i.e., the erosion of his property). A potential plaintiff should also know of its cause (i.e., allegedly, the Westhampton groin field).

VIII. CONCLUSION

The continually rising costs of litigation over government-sponsored projects is one likely explanation for the decrease in federal participation in beach erosion and hurricane protection projects. In the Second Circuit alone, the government is still involved in litigation stemming from its work on one project completed in the early 1960s.¹⁷¹ Because the Second Circuit has labeled erosion allegedly caused by this project "a continuing tort for which the cause of action accrues anew each day,"¹⁷² the end to litigation is nowhere in sight.

As an equitable matter, it is important for the Second Circuit to limit its holding in *Rapf* to cases involving New York litigants. The court should also clarify its statement that erosion allegedly caused by the Westhampton groin field is "a continuing tort for which the cause of action accrues anew each day."¹⁷³ Taken to its extreme, this statement might mean that if the government has interfered with a wave in any way a new cause of action would consequently accrue each time that wave hits the shore. This interpretation would expose the government to claims for erosion associated with projects decades after their completion. The government maintains nearly 100 coastal harbor projects.¹⁷⁴ The above interpretation of the Second Circuit's holding would create a tremendous burden for the government and the Corps as it relates to erosion of beachfront property caused by the blockage of

¹⁶⁹ See, e.g., newspaper and magazine articles cited *supra* notes 2, 19, 51, 61; newspaper articles cited *supra* notes 2, 51, 61; see also John A. Black and Jeffrey Kassner, *Protecting Westhampton Beaches*, *NEWSDAY* (Long Island), Apr. 3, 1984, at 50; Jeffrey Kassner and John A. Black, *Offering a Solution for Westhampton Beach Erosion*, *N.Y. TIMES* (L.I.), June 10, 1984, at 30.

¹⁷⁰ The fact that the Supreme Court has held that service of process may be effected through publication can be interpreted as supportive evidence that the Court assumes that people read the newspaper for at least certain purposes. *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Hanson v. Denckla*, 357 U.S. 235 (1958); *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

¹⁷¹ *Rapf v. Suffolk*, 755 F.2d 282 (2d Cir. 1985).

¹⁷² *Id.* at 292.

¹⁷³ *Id.*

¹⁷⁴ SHORELINE PROTECTION AND BEACH EROSION CONTROL TASK FORCE, *supra* note 6, at i-ii.

littoral drift. Plaintiffs in the most recent Second Circuit cases claimed nearly \$300 million in damages.¹⁷⁵ Claims could be filed years after a project was constructed. The magnitude for potential budgetary drain is enormous. As such, government-sponsored shore protection projects will be eliminated. Those who build on the beach will be left to fend for themselves when their homes are swallowed by the ocean. The American public's primary recreation areas will be reduced to ruins.

¹⁷⁵ See *supra* note 65.